UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

In the Matter of: SCOMA'S OF SAUSALITO, LLC, Employer, and UNITE HERE LOCAL 2850 Union.	Case No. 20-CA-116766

UNITE HERE LOCAL 2850'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

TABLE OF CONTENTS

I. Preliminary Statement

On April 22, 2014, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint in the above matter alleging that the Respondent, Scoma's of Sausalito, LLC ("Employer" or "Scoma's"), violated Section 8(a)(5) and (1) of the National Labor Relations Act by withdrawing recognition of the Charging Party, UNITE HERE Local 2850 ("Union" or "Local 2850"), as the exclusive representative of Respondent's employees in an appropriate unit.

The Board has explicitly held that an employer may not withdraw recognition from a union unless, at the time the employer withdraws recognition, the union has in fact lost the support of the majority of the employees in the relevant bargaining unit. An employer's "good faith belief" that the union has lost majority support is not sufficient to support such a withdrawal of recognition. Where an employer withdraws recognition based on such a belief, it does so "at its peril."

Further, where an employee has signed a decertification petition but then reaffirmed her support for the union prior to the withdrawal of recognition, her signature may not be relied upon by the employer to rebut the presumption of continuing majority status.

Here, the Employer withdrew recognition from Local 2850 on October 31, 2013. The Employer relied on employee signatures on a decertification petition submitted to the Employer on October 28. The petition contained the signatures of a bare majority of the 54 employees in the unit. However, prior to the Employer's withdrawal of recognition, six employees expressly revoked their signatures from the decertification petition and reaffirmed their support for the Union as their bargaining representative. Two additional employees

who had signed the decertification petition signed a separate petition expressly reaffirming their support for the Union as their bargaining representative.

As of October 31, 2013, the decertification petition relied on by the Employer did not contain sufficient valid signatures to demonstrate that the Union had lost the support of the majority of employees in the bargaining unit.

II. Statement of Facts

A. Background

Scoma's operates a seafood restaurant in Sausalito, California. For over fifteen years, Local 2850 has represented a bargaining unit comprised of the restaurant's servers, cooks, dishwashers, bartenders, hostesses and bussers. JX-1. As of October 31, 2013, the bargaining unit consisted of 54 employees. JX-1. According to Scoma's General Manager Roland Gotti, approximately 40 of the 54 unit employees speak a language other than English as their primary language. For 32 out of the 54, that language is Spanish. Tr. 80

The most recent collective bargaining agreement between the parties was effective between December 2010 and September 30, 2012. Tr. 24. Local 2850 lead organizer Lian Alan negotiated that agreement on behalf of the Union. Gotti negotiated on behalf of Scoma's. Tr. 24; 58. After the 2010-2012 agreement expired, the Employer continued to honor its terms, including by continuing to make contributions to the health and welfare benefit trust funds.

The Union, through Lian Alan, formally requested dates for negotiations over a successor agreement through an email to Scoma's general manager Roland Gotti dated October 28, 2013.[1] GCX-2. Gotti did not respond to this request. Tr. 26.

Three days later, on October 31, Scoma's attorney, Diane Aqui, sent Alan and Union President Wei-Ling Huber a letter refusing the request to bargain over a successor contract and withdrawing recognition from the Union. JX- 3; Tr-XX.

B. The decertification petition.

Scoma's employee Georgina Canche began circulating an anti-union petition among Scoma's employees in late September 2013. RX-1. On October 28, Canche filed the petition with the NLRB and made a copy of the petition for Gotti. She gave the copy to her friend and fellow Scoma's employee Maria Tasheva, who lived with Gotti at the time. The two are now married. Gotti received the copy of the petition that evening. Tr. 60. There were 29 signatures on the petition. Tr. 60. Gotti did not notify the Union of the existence of the petition or inform the Union that he planned to withdraw recognition.

C. Union organizer Lian Alan's October 29th visit to Scoma's.

Approximately a week prior to the October 31 withdrawal of recognition, Lian Alan received a few phone calls from Scoma's employees expressing concern that employees were being solicited to sign a decertification petition. Tr. 28. He wasn't sure at that time whether it was in fact a decertification petition, but he suspected it to be based on what workers were telling him. Tr. 32.

[1] All dates 2013 unless otherwise indicated.

Alan went to Scoma's on October 29 to talk with employees about what was going on. Prior to his visit, based on his belief that employees were being solicited to sign a decertification petition, Alan prepared two counter-petitions. One was formal and succinct, written in both English and Spanish, and provided as follows:

> If I signed a petition to decertify or get rid of the Union, I hereby revoke my signature. I do wish to continue being represented by Unite Here Local 2850 for the purposes of collective bargaining.

GCX-3 ("revocation petition").

The second petition was also written in both English and Spanish. It had more of an organizing message, starting with a headline in large type: "We are the workers of Scoma's, and WE ARE UNITED! ESTAMOS UNIDOS!" GCX-4 ("unity petition"). In addition to the headline, the unity petition consisted of the following affirmation of support for the Union as the collective bargaining representative of Scoma's employees:

> We work hard every day to provide the best service to our customers. We want Scoma's to succeed, and at the same time we need support and respect to succeed. We wish to continue to be represented by UNITE HERE 2850 for the purposes of collective bargaining. We want to bargain with the management of Scoma's for fair raises for the hard work we do and affordable health insurance.

GCX-4.

Alan arrived at Scoma's between 2:30 and 3:30 pm on the 29th. He was accompanied by Maria Munoz, a member of Local 2850 who works as a janitor at the Castlewood Country Club. Tr. 28. Munoz had been through a decertification effort at Castlewood. Tr. 39.

He and Munoz first spoke with shop steward Clem Hyndman on the sidewalk near the waiting area in the front of the restaurant. As they were speaking with Hyndman, the

afternoon shift change began, with some employees getting off work after the lunch shift and others arriving for the evening shift. Tr. 27-28.

Aside from Hyndman, the first employee Alan spoke with that afternoon was Fernando Montalvo, a cook. Tr. 28. Alan is a fluent Spanish speaker and the two spoke Spanish with each other during this conversation. Tr. 30. Montalvo spoke with Alan about being asked to sign a decertification petition. Tr. 29. Montalvo said he was told that if he didn't sign it, it would look bad because he wouldn't be on the petition when it was given to the Employer. Tr. 29. Montalvo asked Alan what it would mean if the Union was decertified at Scoma's. *Id*. Alan explained that, without the Union, the Employer would have the discretion to change wages and working conditions at will: "I said to him that if the Union was decertified at Scoma's, then it would be 100% up to the Employer what the benefits, wages, and working conditions would be." Tr. 29. Montalvo's response was that he did not want to decertify the Union. *Id*. Alan told Montalvo that he could withdraw his name from the decertification petition if he wanted to. Montalvo signed the revocation petition in Alan's presence. Tr. 30. He then left to work a shift at his second job. *Id*. They did not discuss the unity petition.

Alan was still standing in front of the restaurant when Montalvo left. *Id*. At that point several other employees began to gather around. Tr. 30. Some of the employees let Alan know that they were afraid to be seen with him directly in front of the restaurant, so he, Munoz, Hyndman, and several other bargaining unit members walked down the sidewalk fronting the Bay, towards downtown Sausalito. There was a small pier with an open area about half a block from the restaurant where they stopped to talk. Tr. 31. The pier is in front of restaurant called Barren House. Tr. 136.

By the time they reached the pier, the following employees had joined the conversation: Juan Santos, Luciano Yah Chi, Rene Rodriguez, Nicolas Villalobos, Jose Yah Chi. Once they reached the pier, the first part of the conversation consisted of employees asking Alan to explain what the decertification petition was. Tr. 31-32. Alan had not seen the petition, but he shared his understanding of what could happen if it was a decertification petition. Tr. 32. Alan told employees that there were several possibilities. One was that the petition could lead to an NLRB election at Scoma's to determine whether employees wanted to continue to be represented by the Union. Tr. 33. However, if a majority of employees had signed the petition, there was a possibility that Scoma's would withdraw recognition from the Union without an election:

> I explained to them that if the – if Georgina [Canche] or whomever was signing people up on the petition, turned that petition in to the federal government and then the federal government could have an election at Scoma's to determine whether workers wanted to have the Union or not. I also said that if the majority of workers signed the petition, then it was possible that Scoma's could withdraw recognition from the Union.

Tr. 33. After hearing this explanation from Alan, several employees told him that they felt tricked into signing the petition. They told Alan that they didn't know that it was a petition to get rid of the Union. Tr. 33. Alan then reminded employees that while it was possible that there would be an election, in the mean time they also had the option of withdrawing their names from the decertification petition. Tr. 35. He then presented the revocation petition to them. Juan Santos, Luciano Yah Chi, Rene Rodriguez, Nicolas Villalobos, and Jose Yah

Chi each signed and dated the petition in Alan's presence. Tr. 34-35; GCX-3.[2] At that point, Juan Santos had to leave, but the others remained with Alan, Munoz, and Hyndman on the pier. Tr. 35.

Employees then asked Alan what would happen if the Union no longer represented employees at Scoma's. Tr. 35. Alan responded that, without the Union, it would be up to Scoma's to decide what workers' wages and benefits would be. Tr. 36. "They could choose to leave them the same; they could choose to change them." Tr. 36.

Alan then talked about how if workers didn't want to lose the Union, it wasn't just a matter of revoking their signatures from the decertification petition, but "we also need to stick together with all of our coworkers" in negotiations for a new contract. Tr. 36. He then presented employees with the second petition – the unity petition: "I had also prepared a petition in English and Spanish calling for unity amongst the workers at Scoma's and a fair contract and to continue to be represented by Unite Here, Local 2850, and so I presented that petition to these employees to see if they would like to sign it." Tr. 37. At that point, Luciano Yah Chi, Rene Rodriguez, Nicolas Villalobos, and Jose Yah Chi each signed the unity petition. Tr. 37; GCX-4.

After signing the unity petition, the four remaining employees posed for a picture on the pier with Munoz and Hyndman. As Alan took the picture, the group smiled, held hands, and raised them in the air. GCX-5. In the picture, from left to right, are Jose Yah Chi, Rene Rodriguez, Maria Munoz, Clem Hyndman, Luciano Yah Chi, and Nicolas Villalobos. Tr.

[2] The date accompanying the signature of Rene Rivera Rodriguez is somewhat difficult to read. Both Alan and Rodrigues affirmed that Rodriguez signed on October 29, at the same time as Santos, L. Yah Chi, Villalobos, and J. Yah Chi.

40. The group continued talking on the pier for a minute or two after Alan took the photo, and then most of the employees left to go home or to another job. Tr. 41.

At that point Alan, Munoz and Hyndman walked back towards the restaurant, where Alan and Hyndman spoke to another employee, Jessica Taylor. Tr. 41. Taylor also signed both the revocation petition and the unity petition, though she had not signed the original petition circulated by Georgina Canche. Tr. 41-42. After speaking with Taylor, Alan and Munoz left Scoma's. All of the signatures on the revocation petition (GCX-3) were collected by Alan on October 29th. Tr. 45-46.

Prior to leaving Scoma's that day, Alan left copies of the unity petition with Hyndman. Tr. 44. He received the unity petition back from Hyndman with additional signatures within the following week. *Id.* The unity petition signatures gathered prior to October 31 included two additional employees who had previously signed the decertification petition: Rosendo Carrasco and Carlos Mazariegos. RX-1; GCX-4.

D. The withdrawal of recognition.

The same day he received a copy of the decertification petition, Gotti received the email from Lian Alan, requesting dates for bargaining a successor contract. GCX-2; Tr. 26. The following day, on October 29, the NLRB notified the Employer and the Union that a decertification petition had been filed, and set a date for a representation hearing. Nevertheless, four days after receiving the petition and the Union's request to negotiate, and three days after receiving notice that the petition had been filed with the NLRB, Gotti decided to unilaterally withdraw recognition from the Union. He did so by a letter sent to Lian Alan by Scoma's attorney, Diane Aqui, on October 31, 2013. Gotti then announced to employees that he had withdrawn recognition from the Union.

E. The objective evidence at the time of withdrawal.

As discussed above, Lian Alan had collected 7 signatures on the revocation petition on October 29. Six of them belonged to employees who had previously signed the decertification petition. These will be referred to as "cross-over signatures." The unity petition contained two additional cross-over signatures gathered prior to October 31st. In order to show that the Union lacked majority status at the time of the withdrawal of recognition on the basis of the decertification petition, the Employer would need to show at least 27 valid decertification signatures. Without the cross-over signatures, the petition relied upon by Scoma's contained, at most, 21 signatures, or 39% of the bargaining unit.

III. Argument

The Employer's admitted withdrawal of recognition from the Union violated Section 8(a)(5) and (1) of the Act because the Employer failed to establish, by a preponderance of the evidence, that the majority of the bargaining unit did not want to be represented by the Union. Rather, the evidence presented by the Employer did not negate the Union's presumption of majority support.

The Employer's allegations of coercion on the part of the Union do not mandate a different result. First, the allegations are not supported by credible evidence. Second, even if the allegations were credible, in order for a Union's statement to constitute a coercive threat, the statement must concern actions that are within the Union's ability to carry out. The matters raised by Employer witnesses concerned possible Employer conduct regarding wages and benefits, job security, or immigration. None of the allegations concerned a threat that was within the Union's power to carry out.

Further, any contention that the Board should consider after-acquired evidence in evaluating whether the Employer has met its burden is plainly contrary to *Levitz* and the cases that follow it. Nor are there any policy considerations to support the notion that a union should be required to provide an employer with notice that it is gathering evidence of continuing employee support for the Union.

A. The Employer's unilateral withdrawal of recognition from the Union violated Section 8(a)(5) and (1) of the Act.

1. An employer violates the Act by withdrawing recognition from the union unless it can prove, as an affirmative defense, that, at the time of withdrawal, it had objective evidence showing that the union lacked majority support.

In *Levitz Furniture*, 333 NLRB 717 (2001), the Board announced its current standard for evaluating employer withdrawals of recognition. Under *Levitz*, an employer withdrawal of recognition is unlawful unless the employer can prove, by a preponderance of objective evidence, that the union had in fact lost majority support at the time of the withdrawal of recognition. This replaces the prior "good faith belief" standard, which had permitted an employer to withdraw recognition based on a "good faith belief" that a majority of employees no longer wished the union to represent them. Under the prior standard, such a withdrawal of recognition could be lawful, even if a majority of employees still supported the union.

As the *Levitz* board observed, "In our view, there is no basis in either law or policy for allowing an employer to withdraw recognition from an incumbent union that retains the support of a majority of the unit employees, even on a good-faith belief that majority support has been lost." *Levitz*, supra, at 723. This is partly because, where an employer has evidence that casts doubt on employees' continuing support of the union, it may test employee support

though a Board election process. Further, the *Levitz* Board adopted a relaxed standard for evaluating RM petitions, requiring only that an employer harbor "uncertainty" regarding a union's majority status, rather than actual *disbelief*. As the *Levitz* Board stated, "by adopting the "good-faith uncertainty" standard for processing RM petitions, we are lowering the showing necessary for employers to obtain elections and reducing the temptation to act unilaterally." *Id*. at 725. Where an employer does act unilaterally, despite the availability of the Board's election process, the employer's good faith belief, even where based on objective evidence, does not protect the employer from liability for withdrawing recognition:

"We emphasize that an employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—*withdraws recognition at its peril*. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, *the employer will have to prove by a preponderance of the evidence* that the union had, in fact, lost majority support *at the time the employer withdrew recognition*. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5)." *Id.* at 725 (emphasis added).

Because actual loss of majority support is an affirmative defense to the refusal to bargain charge, the burden for making such a showing falls on the employer. *Id. See also Flying Foods Group*, 471 F.3d at 183.

2. The General Counsel and the Union rebutted the Employer's evidence of majority disaffection by showing that six employees had revoked their signatures from the decertification petition, and two more had signed a petition expressly reaffirming their support for the Union as their bargaining representative.

Where an employee has signed a decertification petition, and subsequently revokes their signature or otherwise demonstrates support for the union, the employer may not rely on that employee's decertification signature to support a unilateral withdrawal of recognition. *HQM of Bayside, LLC*, 348 NLRB 758 (2006).

Here, the proper date for assessing whether the Employer has met this burden is October 31, the date the Employer withdrew recognition, not September 28, the date Gotti received the petition. Of the 29 signatures on the decertification petition, six employees revoked their signatures prior to the withdrawal of recognition and two more employees expressly reaffirmed their support for the Union. Those eight signatures may not be relied upon by the Employer, leaving a maximum of 21 valid signatures, or just 39% of the unit. Thus, the Employer has not met its burden of proving, by a preponderance of the evidence that a majority of employees no longer wished to be represented by the Union as of October 31.

B. The Employer's attempts to challenge the revocation signatures are not supported by law or fact.

1. Employees revoked their signatures from the decertification petition without any threat or coercion on the part of the Union.

Lian Alan testified credibly about the content of his conversations with employees on October 29th. He told employees that, without a union, decisions about wages, benefits, and other working conditions would be up to the employer. "They could choose to leave them the same; they could choose to change them." Tr. 36. He specifically denied making the allegedly coercive statements attributed to him by the Employer's witnesses.

2. The Board has consistently held that to constitute a threat, the speaker must have the power to carry out its prediction.

In order to be coercive, union threats directed at employees must be within the union's power to carry out. *Rio de Oro Uranium Mines, Inc.*, 120 NLRB 91, 94 (1958). In a recent case, the Board found this concept to be "well-established":

> Even assuming that [the union's] statements could be construed as "threats" . . . [the union] manifestly had no power to carry out such threats. It is well established that the Board will not find a threat by a party to be objectionable unless the party has the ability to carry out the threat. See, e.g., *Smithfield Packing Co*., 344 NLRB 1, 11 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006); *Pacific Grain Products*, 309 NLRB 690, 691 (1992).

The Permanente Medical Group, Inc., 358 NLRB No. 88 (2012). See also, Pacific Grain Products, 309 NLRB 690, 692 (1992) ("Here, the Employer has not alleged nor offered evidence that Alvarez or the Union had any control over Figueroa's job security. Thus, Figueroa could not reasonably believe that Alvarez or the Union had the ability to carry out the alleged threat."); *Bonanza Aluminum Corp.*, 300 NLRB 584 (1990).

In *Air La Carte, Inc.*, 284 NLRB 471 (1987), the Board addressed the issue of statements made by an incumbent union in a decertification election about what an employer might do if the incumbent was decertified. At issue in the case were statements by the incumbent union's shop steward, who told fellow employees that "if the employees voted in the Teamsters or went nonunion, the employees would lose the benefits of the contract that they had and that, during the interim period of no contract, the employees could lose their health benefits and suffer a reduction in pay" and that without a contract, "the Employer could hire new employees to handle the Philippine Airlines catering business that it had, and the employees could lose all seniority." *Id*. at 473.

The Board held that the statements by the steward were not coercive and did not tend to interfere with the employees' freedom of choice in the election, and thus were not

objectionable: “[T]hese statements could not constitute threats by [the union], for it had no control over what action Air La Carte might take if [the union] lost the election." *Id*. at 473-74 (footnote omitted).

On the other hand, if a union threatens employees that they will lose benefits over which the union has control, the Board may find an unlawful threat. *See Condiotti Enterprises*, 328 NLRB 947 (1999) (unlawful threat where Union told employees that "We can lock up your pension. We can lock up your annuity."); *Sans Point Nursing Home*, 321 NLRB 399 (1996); *Wilkinson Manufacturing Co. v. NLRB*, 456 F.2d 298, 302 (8th Cir.1972) (objectionable where Union field representative stated to an anti-union employee "that if the union got in it 'had ways' of getting rid of non-union employees"). In such cases, the threatening nature of a union's statement is based on some future action that the employee has reason to fear the *union* may take.

Here, as in *Air La Carte*, the Union had no power to bring about the actions it allegedly threatened the Employer would take. It had no power to reduce wages or benefits, cause employees to lose their jobs, or cause the Employer to “throw immigration” at the employees.

3. Even if the Employer’s allegations are taken as true, the alleged statements were not coercive, and did not invalidate the revocation signatures.

The Union did not make the threatening statements alleged by the Employer’s witnesses. But even if the allegations are credited as true, the statements would not constitute coercion, and would not affect the validity of the employee signatures on the revocation and unity petitions.

Furthermore, even if the alleged statements made to Jose Yah Chi, Luciano Yah Chi, Villalobos, Rodriguez, and Santos were found to be coercive, the evidence presented by the Employer would not effect the signatures of at least three of the unit members.

First, Fernando Montalvo was not part of the conversation that took place at the pier down the sidewalk from Scoma's. On October 29, Alan spoke with Montalvo on the sidewalk in front of the restaurant. "First I spoke with Fernando, because he was coming out of work." Tr. 28. Montalvo signed the revocation petition during this conversation, and left before Alan and the other employees walked down the sidewalk to the pier. Tr. 30-31.

Second, he only testimony offered by Carlos Mazariegos was that Clem Hyndman told him that employees *might* lose benefits. "She told me that I should support the Union because otherwise we might lose all benefits…" Tr. 189. If Hyndman said his, it was an accurate statement of fact – without a union, employee benefits are up to the discretion of the employer – and would not be contstrued as a threat under any circumstances.

Third, there was no allegation that Rosendo Carrasco's signature on the unity petition was invalidated by any threatening statement made by the Union. Carrasco's signature on the unity petition is dated October 30 (GCX-3), and matches his signature on his I-9 form (JX-5, p. 2) and his handwriting on the decertification petition. RX-1.

Even if the Union had not gathered any other valid signatures, these three would leave the decertification petition with only 26 signatures, or 48% of the unit. Thus, leaving aside the other five valid revocation signatures, the Respondent could not carry its burden of proof to show objective evidence that the Union had lost majority support as of October 31.

4. The Employer stipulated that it relied on the decertification petition when it withdrew recognition; the Board will not examine testimony

regarding evidence of employee disaffection that was not "actually relied on" by the employer.

The parties stipulations included the following: "Respondent relied upon the decertification petition attached as Respondent Exhibit 1 in withdrawing recognition from the Union on October 31, 2013." JX-1, par. 10. Nevertheless, at the hearing, Respondent solicited testimony regarding three additional employees who did not sign the decertification petition. The Board does not permit an employer to bolster its defense with evidence that was not relied upon at the time it withdrew recognition. *RTP Co.*, 334 NLRB 466, 469 (2001), enfd. 315 F.3d 951 (8th Cir. 2003), cert. denied 540 U.S. 811 (2003) ("In analyzing the adequacy of an employer's defense to a withdrawal of recognition allegation, the Board will only examine factors 'actually relied on' by the employer. Conduct of which the employer may have been aware, but on which the employer 'did not base' its decision to withdraw recognition from the Union, is of 'no legal significance.'") [citations omitted]. Allowing such evidence would encourage employers to unilaterally withdraw recognition without objective evidence that the union had in fact lost majority support, in hopes that it could muster such evidence prior to the hearing before the administrative law judge. Such a policy would defeat the intent of *Levitz* to discourage employers from taking unilateral action, particularly in the absence of evidence clearly indicating that the union in question has lost majority support.

C. There are no compelling policy reasons to change the Board's determination that a union need not notify an employer that it is gathering evidence of continuing majority support.

1. Point heading

In *Fremont-Rideout*, the Board upheld the ALJ's conclusion that "the Union was under no obligation to notify the [Employer], even if it had time and an opportunity, of its continued majority status by way of the reaffirmation cards it had obtained." *Id*. at 460. Further, the Board held that the union had "no burden nor was it obligated, in any way, to notify or advise the Hospital of the 18 cards in its possession" Id. at 459. *Fremont Medical Center & Rideout Memorial Hospital,* 354 NLRB 453, 459-60 (2009) *adopted by* 359 NLRB No. 51 (2013).

In *Fremont-Rideout*, Member Shaumber agreed that there is no affirmative obligation on the part of a union "confronted with a withdrawal of recognition" to notify the employer that it posesses evidence "tending to negate the employer's evidence of loss of majority support." *Id*. at n. 3. That said, he found it "difficult to square" the clear holdings of *Levitz* with a comment by the *Levitz* Board, in dicta, that "had the Union not asserted that it had contrary evidence, the Respondent would have had a good case, based on the petition it received from a majority of the unit employees, that the Union had, in fact, lost majority support." *Id*. However, this passage does not refer to whether or not the union in that case asserted that it had contrary evidence *prior to* the withdrawal of recognition. Rather, it refers to how the case would have been evaluated under the *Levitz* doctrine if the union had not asserted any contrary evidence in the unfair labor practice proceedings. The comment was simply an example of the *application* of the following framework: "An employer who presents evidence that, at the time it withdrew recognition, the union had lost majority support should ordinarily prevail in an 8(a)(5) case if the General Counsel does not come forward with evidence rebutting the employer's evidence. If the General Counsel does present such evidence, then the burden remains on the employer to establish loss of majority

support by a preponderance of all the evidence." *Id*. at n.49. Thus the comment has nothing to do with whether a union provides such notice to the employer prior to the withdrawal of recognition.

Leaving Member Shaumber's comments aside, there is simply no compelling policy reason to impose such a requirement.

First, to impose such a requirement would interfere with the primary policy rationale for the *Levitz* decision itself—to rid the law of circumstances under which an employer may unilaterally withdraw recognition from a union that continues to enjoy the support of a majority of its employees.

The only reason the Board refrained from outlawing unilateral withdrawals altogether was its belief that the lower standard for filing an RM petition would "reduc[e] the temptation to act unilaterally." Imposing additional procedural requirements on the Union could only increase that temptation, and with no attendant advantage in protecting Section 7 rights.

Second, the practical implications of such a requirement would be unmanagable. For example, in this case, the Employer withdrew recognition from the Union just three days after receving a copy of the decertification petition, and with no prior notice to the Union. The Union suspected that a decertification petition was being circulated, but did not know that a copy would be provided to the Employer, or if so, when, or if so, whether the Employer would take any action based on the petition, or if so, when it would choose to take such action.

Under such circumstances, to require the Union to notify the Employer that it had gathered evidence of continuing employee support would have been both unmanageable and

intrusive. Would the Union have had to update the Employer at the end of each day? Would it have to provide the Employer with the names of the employees who had revoked their signatures or reaffirmed their support, so that the Employer could check them against the decertification petition? Conversely, would the Employer have to provide the Union with the names of all employees who had signed a decertification petition? The everyday implications of such a requirement would increase the complexity of these cases, rather than simplifying them.

Third, such a requirement would not increase employee free choice. As the Board in *Levitz* pointed out, both employees and employers can file for a Board election based on a much lower showing of employee disaffection. Thus, unilateral withdrawal is not necessary under any circumstances to vindicate employee rights. Given the rebuttable presumption that the union continues to enjoy majority support, the Union has the right to challenge such a withdrawal through an unfair labor practice proceeding. In such a proceding it is the Employer's ultimate burden to rebut that presumption, rather than the Union's burden to support it.

A final passage from *Levitz* is worth quoting at length here:

> Employers' invocation of employee free choice as a rationale for withdrawing recognition has, with good reason, met with skepticism. As the Supreme Court observed in *Auciello Iron Works v. NLRB*, "The Board is accordingly entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one. There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom." 517 U.S. at 790. *See also NLRB v. Cornerstone Builders, Inc*., 963 F.2d at 1078 ("unilateral withdrawal is based on the subjective belief of an inherently biased party")."

Id. at 724, n. 45.

IV. Conclusion

Based on the foregoing, Local 2850 requests that the Administrative Law Judge find that Respondent violated Section 8(a)(1) and (5) of the Act, as alleged in the complaint. Local 2850 requests that the Administrative Law Judge recommend an affirmative bargaining order. The Board has long held that such an order is an appropriate and necessary remedy where an employer has unlawfully withdrawn recognition, as in this case.

Dated: January 13, 2015

Respectfully submitted,

By: */s/ Elizabeth Q. Hinckle*

Elizabeth Q. Hinckle
DAVIS, COWELL & BOWE, LLP
595 Market Street, Suite 1400
San Francisco, CA 94105

Attorneys for Charging Party
UNITE HERE Local 2850